March 16, 2007

M-37013

Memorandum

To: Director, U.S. Fish and Wildlife Service

From: Solicitor

Subject: The Meaning of "In Danger of Extinction Throughout All or a Significant Portion of its Range"

I. INTRODUCTION

Since 1973, the Endangered Species Act (ESA) has defined "endangered species" as "any species which is in danger of extinction throughout all or a significant portion of its range." Endangered Species Act of 1973 § 3(6), 16 U.S.C. § 1532(6) (2006) (ESA/Act). Thirty-three years later, questions continue to be raised about the meaning of the phrase "in danger of extinction throughout … a significant portion of its range" (SPR phrase/SPR language).

As a result of these continued questions, the Fish and Wildlife Service (Service) is working to develop a policy on how to apply the SPR phrase when determining whether a species is an endangered species under the Act.[1] To facilitate the development of this policy, you have requested this Office's view of the meaning of the SPR phrase. Our office has reviewed the statutory language, the legislative history, relevant court rulings, and Departmental practices. I provide you our most informed view of the general meaning of the SPR phrase and the specific meaning of its component terms, particularly "significant" and "range."

Your effort to develop a policy is prompted, in part, by the 2001 decision of the Ninth Circuit Court of Appeals that rejected the interpretation of the SPR phrase favored by the Department. *Defenders of Wildlife v. Norton*, 258 F.3d 1136 (9th Cir. 2001) (flat-tailed horned lizard).[2]

[1] Because the definition of "threatened species" under the ESA includes the SPR phrase—i.e., a threatened species is "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range"—the opinion given in this memorandum about the meaning of the SPR phrase also applies when the Service is determining whether a species is a threatened species.

[2] Seven district courts have essentially adopted or followed the Ninth Circuit's interpretation. *See Nat'l Wildlife Fed'n v. Norton*, 386 F. Supp. 2d 553 (D. Vt. 2005) (gray wolf); *Defenders of Wildlife v. Secretary, U.S. Dept. of the Interior*, 354 F. Supp. 2d 1156 (D. Or. 2005) (gray wolf); *Defenders of Wildlife v. Norton*, 239 F. Supp. 2d 9 (D.D.C. 2002) (Canada lynx); *see also Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, 402 F. Supp. 2d 1198 (D. Or. 2005) (coastal cutthroat trout) (following flat-tailed horned lizard case in general, without directly addressing other possible interpretations); *Envtl. Protection Info. Ctr. v. Nat'l Marine Fisheries Serv.*, No. C-02-5401 EDL (N.D. Cal. Mar. 1, 2004) (green sturgeon) (same); *Southwest Ctr. for Biological Diversity v. Norton*, CA

There, the Ninth Circuit interprets the SPR phrase as a "substantive standard" for determining whether a species is an endangered species. Under the court's interpretation, there are two situations in which the Secretary must determine a species to be an endangered species: 1) where the Secretary finds that the species is in danger of extinction throughout all of its range; or 2) where the Secretary finds that the species is in danger of extinction throughout a significant portion of its range.

Since approximately 2000, the Department, on the other hand, has interpreted the SPR phrase to mean that a species is an endangered species only when it is in danger of extinction throughout a portion of its current range that is "so important to the continued existence of a species that threats to the species in that area can have the effect of threatening the viability of the species as a whole." *Ctr. for Biological Diversity v. Norton*, 411 F. Supp. 2d 1271, 1278 (D.N.M. 2005), *appeal pending* (Rio Grande cutthroat trout). Under the Department's interpretation, there is only one situation in which the Secretary must find a species to be an endangered species—when the Secretary finds that it is in danger of extinction throughout all of its range. Under this interpretation, the Secretary need not demonstrate that there are threats so severe throughout the range that the species is in danger of extinction in every portion of its range. Instead, if the Secretary can demonstrate that the species faces threats in only a portion of its range so severe as to threaten the viability of the species throughout its range, a determination that a species is an endangered species would be justified. In other words, since approximately 2000, the Department has viewed the SPR phrase not as providing another "substantive standard" for determining whether a species is an endangered species, but rather as "clarifying" the evidentiary burden the Secretary must satisfy when making that determination.[3] For this reason, the Department's interpretation of the SPR phrase is sometimes referred to as the "clarification interpretation." The Department's interpretation of the SPR phrase was recently upheld by the District Court of New Mexico. *Id.* Only two district courts have upheld the Department's interpretation, to date.[4]

No. 98-934 (RMU/JMF), 2002 U.S. Dist. LEXIS 13661 (D.D.C. July 29, 2002) (magistrate's recommendation) (Queen Charlotte goshawk) (same), *adopted in rel. part*, slip op. (D.D.C. May 24, 2004); *Defenders of Wildlife v. Norton*, CA 99-02072 (HHK) (D.D.C. Dec. 13, 2001) (Florida black bear) (same).

[3] Prior to the 1978 Amendments, some listings specified that species were endangered in only part of their range within the United States. Boundaries for these partial range listings varied from the U.S.-Canadian border defining the contiguous United States for such species as the grizzly bear, 40 Fed. Reg. 31,376 (July 28, 1975), and gray wolf, 41 Fed. Reg. 17,742 (Apr. 28, 1976), to a mere three parishes in Louisiana comprising the listed range of the American alligator, 40 Fed. Reg. 44,412 (Sept. 26, 1975). Species were also listed as endangered in some states and threatened in others, such as the gray wolf, 41 Fed. Reg. 24,062 (June 14, 1976), and the bald eagle, 43 Fed. Reg. 6230, 6233 (Feb. 14, 1978). However, the determinations therein of endangered species and threatened species do not explain the bases for listing them in only portions of their ranges.

[4] The District Court of Colorado, citing the District Court of New Mexico's decision with no additional analysis, also upheld the Department's interpretation of the SPR phrase. *Ctr. for Biological Diversitv v. U.S. Fish & Wildlife Serv.*, CA No. 05-cv-00305-RPM, 2007 U.S. Dist. LEXIS 16175, at *8 (D. Colo. Mar. 7, 2007) (Bonneville cutthroat trout).

For the reasons given below, I conclude that:

1. The SPR phrase is a substantive standard for determining whether a species is an endangered species—whenever the Secretary concludes because of the statutory five-factor analysis that a species is "in danger of extinction throughout … a significant portion of its range," it is to be listed and the protections of the ESA applied to the species in that portion of its range where it is specified as an "endangered species";

2. the word "range" in the SPR phrase refers to the range in which a species currently exists, not to the historical range of the species where it once existed;

3. the Secretary has broad discretion in defining what portion of a range is "significant," and may consider factors other than simply the size of the range portion in defining what is "significant"; and

4. the Secretary's discretion in defining "significant" is not unlimited; he may not, for example, define "significant" to require that a species is endangered only if the threats faced by a species in a portion of its range are so severe as to threaten the viability of the species as a whole.

II. ANALYSIS

A. The Language of the SPR Phrase

As the Supreme Court has recently affirmed, "the starting point in every case involving construction of a statute is the language [of the statute] itself." *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 685 (1982); *see Duncan v. Walker*, 533 U.S. 167, 172 (2001). Where the meaning of the language in a statute is plain, that is normally the end of the inquiry. *Lamie v. United States Trustee*, 540 U.S. 526, 534 (2004); *United States v. Ron Pair Enters.*, 489 U.S. 235, 241 (1989). To determine the plain meaning, the words in a statutory provision that are not defined by the statute itself are customarily given their ordinary meaning. *BP Am. Prod. Co. v. Burton*, 127 S. Ct. 638, 643 (2006) (citing *Perrin v. United States*, 444 U.S. 37, 42 (1979)); *Williams v. Taylor*, 529 U.S. 420, 431 (2000). However, in determining the plain meaning:

> a reviewing court should not confine itself to examining a particular statutory provision in isolation. The meaning—or ambiguity—of certain words or phrases may only become evident when placed in context …. It is a "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme."

Food & Drug Admin. v. Brown & Williams Tobacco Co., 529 U.S. 120, 132–33 (2000) (quoting *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989)).

The SPR phrase has no biologically or scientifically accepted ordinary or technical meaning. Therefore, courts have focused on four words in the SPR phrase as key to interpreting its meaning. Those words are "extinction," "or," "range," and "significant." The meaning of each is addressed below.

1. "Extinction"

"Extinction" is defined by the dictionary as "the condition or fact of being extinct." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 411 (10th ed. 2000).[5] The word "extinct," as used in reference to a plant or animal species, is defined as "no longer in existence," "having died out or come to an end," or "having no living members." *Id.*[6] A fair, but not necessary, implication from this definition is that to be extinct, a species must have no living members anywhere. In other words, using the dictionary definition, a species that once inhabited the United States, but no longer has any living representatives there, arguably cannot be said to be extinct if there are living representatives elsewhere in the world.

Based on the dictionary definition, the Ninth Circuit concluded that "'extinction' suggests total rather than partial disappearance," and that the phrase "in danger of extinction throughout … a significant portion of its range" is therefore "inherently ambiguous, as it appears to use language in a manner in some tension with ordinary usage." *Defenders of Wildlife*, 258 F.3d at 1141. In spite of this conclusion by the Ninth Circuit, it should be noted that "ordinary usage" does not necessarily equate to the dictionary definition. *See Third Nat'l Bank v. Impac, Ltd.*, 432 U.S. 312, 376 (1977) ("As always, the meaning of particular phrases must be determined in context [and] read in context."). Experience suggests that in ordinary usage, people often refer to an animal or plant as being extinct in one place, even though it may not be extinct in all places. For example, a species such as the California condor may be considered extinct in some States although it persists in others.[7]

Moreover, just because the language in a statutory provision may be in "some tension with ordinary usage" does not mean that it lacks a plain meaning. As noted above, plain meaning can also be supplied from the context in which the words are used. *See id.*; *Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir. 1945) (statutory context should be favored over a contrary dictionary definition).[8] In the context of the SPR phrase as a whole the meaning of "extinction" is clear.

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[5] The dictionary definition of "extinction" from a dictionary contemporary with the enactment of the ESA is similar: "the condition or fact of being extinct or extinguished" or "the process of becoming extinct or extinguished." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 806 (16th ed. 1971).

[6] The 1971 definition is again similar: "no longer in existence," "lacking living representatives," or "lacking survivors." *Id*.

[7] Further, no alternative or more specific general or biological term defines the disappearance of a species in only a portion of its range. The term "extirpation" is sometimes used in this manner, but dictionaries generally define "extirpation" in a similar manner to "extinction," as implying total destruction or disappearance. *See, e.g.*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 411 (10th ed. 2000). Similarly, the 1971 definition of "extirpate" is "to destroy totally," "wipe out," "kill off," or "make extinct," and "extirpation" is defined as "the act of extirpating or state of being extirpated." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 806 (16th ed. 1971).

[8] Judge Learned Hand, in this case, stated that "it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose

The word is used as part of a phrase—"in danger of extinction"—that is modified by the phrase "throughout … a significant portion of its range." Thus, for purposes of the ESA, a species can be "endangered" even if it is facing extinction only in a significant portion of its range. In other words, a species does not need to be in danger of extinction everywhere—i.e., be in danger of total disappearance—to merit the protection of the ESA. As long as it is in danger of extinction "throughout ... a significant portion of its range"—i.e., is in danger of disappearing in that significant portion of the range—it must be protected in that portion of its range where, in fact, it is an "endangered species."

This understanding of Congressional intent in using the word "extinction" is supported by the way in which the word is used elsewhere in the ESA. In section 2, Congress found that "various species of fish, wildlife, and plants in the United States" that are of considerable "value to the Nation and its people" "have been rendered extinct," or "are threatened with extinction." ESA § 2(a)(1)–(3). These findings suggest that Congress viewed the disappearance of a species within the part of its range occurring in the United States as constituting "extinction" in that geographic area, even though the species might be prospering elsewhere. Similarly, section 4(c) of the ESA requires the Secretary, when publishing the list of endangered species, to "specify with respect to each such species over what portion of its range it is endangered," the clear implication being that the species can be endangered—i.e., in danger of extinction—in one portion of its range without being in danger of extinction throughout its range. ESA § 4(c)(1). Indeed, to read the SPR phrase instead as requiring that a species be in danger of extinction throughout its entire range before it could be considered "endangered" for purposes of the ESA would severely diminish the Secretary's ability to achieve one of the primary objectives of the ESA, which is to "[safeguard], for the benefit of all citizens, the Nation's heritage in fish, wildlife, and plants." ESA § 2(a)(5).

The legislative history of the ESA is consistent with this reading of the word "extinction," as modified by the SPR phrase. The predecessor statute to the ESA, the Endangered Species Conservation Act of 1969, had defined "endangered species" as follows:

> A species or subspecies of fish or wildlife shall be deemed to be threatened with worldwide extinction whenever the Secretary determines, based on the best scientific and commercial data available to him … that the continued existence of such species or subspecies of fish or wildlife is … endangered ….

The Endangered Species Conservation Act of 1969 § 3(a), 83 Stat. 275, 275 (1969). This provision had been interpreted as requiring that a species be threatened with worldwide extinction before it could be protected.[9] To give the Secretary greater flexibility in his listing decisions, and thus provide greater protection for species, Congress included a new definition of "endangered species" in the ESA of 1973. The House Report on the ESA noted that the new definition of "endangered species" represented "a significant shift in the definition of existing

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or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning." *Cabell*, 148 F.2d at 739.

[9] *See* Appendix at A-4.

law which considers a species to be endangered only when it is threatened with worldwide extinction." H.R. REP. NO. 93-412, at 10 (1973). This legislative history, coupled with the manner in which "extinction" is used elsewhere in the Act, supports a reading of the term "extinction" to include the disappearance of species in only part of its range.

2. "Or"

"Or" is defined in the dictionary as "a function word to indicate an alternative" or "used in logic as a sentential connective that forms a complex sentence which is true when at least one of its constituent sentences is true."[10] MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 815 (10th ed. 2000). In its analysis, the Ninth Circuit focused on the fact that the definition of "endangered species" includes the disjunctive term "or." *Defenders of Wildlife*, 258 F.3d at 1141–42. That definition states that a species is endangered if it is "in danger of extinction throughout all or a significant portion of its range." ESA § 3(6). The Ninth Circuit noted that, where the word "or" is used in a statute, courts must seek to give an independent and separate meaning to the clauses that appear on either side of the word "or"; otherwise, one or the other of the clauses would be surplusage. *Defenders of Wildlife*, 258 F.3d at 1142. This is consistent with "a basic canon of statutory construction" that "a statute ought, upon the whole, be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void or insignificant." *Dodd v. United States*, 545 U.S. 353, 371 (2005).

The Ninth Circuit rejected the Department's interpretation of the definition of "endangered species" because it failed to respect this canon of construction. The court reasoned as follows:

> The Secretary's explanation of this odd phraseology is of no assistance in puzzling out the meaning of the phrase, since her interpretation simply cannot be squared with the statute's language and structure. The Secretary … interprets the enigmatic phrase to mean that a species is eligible for protection under the ESA if it "faces threats in enough key portions of its range that the entire species is in danger of extinction …." [The Secretary] therefore assumes that a species is in danger of extinction in "a significant portion of its range" only if it is in danger of extinction everywhere.
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> If, however, the effect of extinction throughout "a significant portion of its range" is the threat of extinction everywhere, then the threat of extinction throughout "a significant portion of its range" is equivalent to the threat of extinction throughout all its range. Because the statute already defines "endangered species" as those that are "in danger of extinction throughout all … of [their] range," the Secretary's interpretation of "a significant portion of its range" has the effect of rendering the phrase superfluous.

[10] A 1971 dictionary defines "or" in similar terms, as "a function word to indicate an alternative between different or unlike things, states, or actions" or a "choice between alternative things, states, or courses." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1585 (16th ed. 1971).

> Such a redundant reading of a significant statutory phrase is unacceptable. When interpreting a statute, we must follow a "natural reading …, which would give effect to all of the statute's provisions." By reading "all" and "a significant portion of its range" as functional equivalents, the Secretary's construction violates that rule.

Defenders of Wildlife, 258 F.3d at 1141–42 (footnote and citation omitted). Because the Ninth Circuit keyed on the presence of the disjunctive "or" in the definition, its interpretation is sometimes referred to as the "disjunctive interpretation."

On the other hand, the New Mexico court, while agreeing with the Ninth Circuit that the SPR phrase is ambiguous, disagreed with the Ninth Circuit's conclusion that the Department's interpretation was arbitrary, instead adopting the Department's interpretation as the "most appropriate and logical way to view this puzzling phrase." *Ctr. for Biological Diversity*, 411 F. Supp. 2d at 1280. The court accepted the Department's interpretation and did not independently analyze the meaning of the term "extinction," standing alone or in context, and did not attempt to give separate and independent meaning to the phrases on either side of the disjunctive word "or."

Consistent with the Ninth Circuit's interpretation of "or" and for the reasons discussed below, I conclude that if the Secretary determines that a species is in danger of extinction in a significant portion of its range, he must specify the portion of its range where it is an endangered species and then apply the protections in the Act to the members of the species in that portion of its range.

3. "Range"

The meaning of "range" in the SPR phrase is not disputed. The general dictionary definition of "range" as "the region throughout which a kind of organism or ecological community naturally lives or occurs," MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 964 (10th ed. 2000),[11] is clear and has not been questioned or debated by any court. Instead, the debate centers on whether the "range" referred to in the definition of "endangered species" is the historical or the current range of the species.

In addressing this issue, context again is key. Under the definition, a species is "endangered" only if it "is in danger of extinction" in the relevant portion of its range. The phrase "is in danger" denotes a present-tense condition of being at risk of a future, undesired event.[12] Hence, to say a species "is in danger" in an area where it no longer exists—i.e., in its historical range—

[11] The 1971 definition of "range" is identical. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1880 (16th ed. 1971).

[12] "Danger" is defined as (among other things) "the state of being exposed to serious loss or injury," meaning that the loss has not happened yet. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 573 (2002); *cf.* MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 292 (10th ed. 2000) (defining "danger" as "exposure or liability to injury, pain, harm, or loss." If a species has already been extirpated from an area, it is not in "danger" there; the loss has already occurred. The 1971 definition of "danger" is similar: "the state of being threatened with serious loss or injury." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 573 (16th ed. 1971).

would be inconsistent with common usage. Thus, "range" must mean "current range," not "historical range." This interpretation of "range" is further supported by the fact that when determining whether a species is an endangered species, the Secretary must consider the "present" or "threatened" (i.e., future), rather than the past, "destruction, modification, or curtailment" of a species's habitat or range. ESA § 4(a)(1)(A).

The Ninth Circuit appears to conclude, however, without any analysis or explanation that the "range" referred to in the SPR phrase includes the historical range of the species. The Ninth Circuit concludes its opinion by stating that a species "can be *extinct* 'throughout … a significant portion of its range' if there are major geographical areas in which it is no longer viable but once was," and then faults the Secretary for not "at least explain[ing] her conclusion that the area in which the species can no longer live is not a significant portion of its range." *Defenders of Wildlife*, 258 F.3d at 1145 (emphasis added); *see Northwest Ecosystem Alliance v. United States Fish and Wildlife Service*, 475 F.3d 1136, 2007 U.S. App. LEXIS 2296, at *35-36 (9th Cir. Feb. 2, 2007) ("[w]e have recognized that a species can be considered extinct throughout a significant portion of its range 'if there are major geographical areas in which it is no longer viable but once was."). This suggests that, in the view of the Ninth Circuit, the range the Service must analyze in assessing endangerment includes the historical range—i.e., the places where the species was once viable but is no longer.[13]

This interpretation is not supported by the statute. Indeed, it appears to be based on an inadvertent misquote of the relevant statutory language. In addressing this issue, the Ninth Circuit states that the Secretary must determine whether a species is "extinct throughout … a significant portion of its range." *Id.* If that were true, the Secretary would necessarily have to study the historical range. But that is not what the statute says, and the Ninth Circuit quotes the statute correctly elsewhere in its opinion. Under the ESA, the Secretary is to determine not if a species is "extinct throughout … a significant portion of its range," but if it "is in danger of extinction throughout … a significant portion of its range." A species cannot presently be "in danger of extinction" in that portion of its range where it "was once viable but no longer is"—if by the latter phrase the court meant lost historical habitat. In that portion of its range, the species has by definition ceased to exist. There it is not "in danger of extinction"; <u>it is extinct</u>.

To determine whether a species is presently "in danger of extinction throughout … a significant portion of its range," the Service must (and currently does) focus on the range in which the species currently exists. Data about the historical range and how the species came to be extinct in that location may be relevant in understanding or predicting whether a species is "in danger of extinction" in its current range.[14] But the fact that it has ceased to exist in what may have been

[13] It is possible that the court was referring to areas within the current range within which the Service expected the species to become extirpated. However, in a subsequent challenge to the Service's decision on remand, the district court held that the Ninth Circuit had required the Service to determine "whether the lizard's lost historical habitat was a significant portion of the range." *Tucson Herpetological Soc'y v. Norton*, No. CV-04-0075-PHX-NVW, slip op. at 9 (D. Ariz. Aug. 30, 2005).

[14] The New Mexico district court agreed with this construction for the most part, noting that "FWS must take into account the species' historical range and reductions thereto[, b]ut even with a reduction in range …, if the remaining core populations ensure the species' survival throughout its range or a significant portion thereof, then the species is

portions of its historical range does not necessarily mean that it is "in danger of extinction" in a significant portion of the range where it currently exists.

4. "Significant"

As explained above, a species can be determined to be an endangered species for purposes of the ESA even if it is in danger of extinction only in a significant portion of its range. However, the question remains, what portion of its range should be considered "significant."

Most, if not all, dictionaries list several definitions of "significant." For example, one standard dictionary defines "significant" as "important," "meaningful," "a noticeably or measurably large amount," or "suggestive." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1088 (10th ed. 2000).[15] If it means a "noticeably or measurably large amount," then the Secretary, in determining endangerment, would have to focus on the size of the range portion in question, either in relation to the rest of the range or perhaps even in absolute terms. If it means "important," then the Secretary would have to consider additional factors, other than size, to determine whether the portion of the range in which a species is "in danger of extinction" is "significant." For example, would the portion of the range be "significant" if it were a key breeding ground of the species, even though the area in question was only a small part of the entire range?

One district court interpreted the term to mean "a noticeably or measurably large amount" without analysis or any reference to other alternate meanings, including "important" or "meaningful." *Defenders of Wildlife v. Norton*, 239 F. Supp. 2d 9, 19 (D.D.C. 2002) (Canada lynx).[16] The court did not explain why the Service could not employ another, equally plausible definition of "significant." Therefore, I find the court's interpretation unpersuasive.[17] It is impossible to determine from the word itself, even when read in the context of the entire statute,

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not endangered." *Ctr. for Biological Diversity*, 411 F. Supp. 2d at 1282. Similarly, the court also stated that a species's "lost habitat may be numerically or geographically large … but not biologically significant because the species' survival is not threatened by the shrinkage in habitat." *Id.* at 1283. The Colorado District Court agreed, finding "persuasive" the New Mexico District Court's interpretation "that the current range is the relevant context." *Ctr. for Biological Diversitv v. U.S. Fish & Wildlife Serv.*, CA No. 05-cv-00305-RPM, 2007 U.S. Dist. LEXIS 16175, at *7 (D. Colo. Mar. 7, 2007).

[15] The 1971 definition of "significant" is "having or likely to have influence or effect" or "deserving of consideration." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2116 (16th ed. 1971). Note that this edition did not include a definition similar to "a noticeably or measurably large amount."

[16] Citing MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (9th ed. 1990). In a subsequent ruling the court rejected the Service's finding on remand that equated "significant" with "important," which the court viewed as contrary to its previous ruling. *Defenders of Wildlife v. Kempthorne*, CA No. 04-1230 (GK), 2006 U.S. Dist. LEXIS 71137, at *36–37 (D.D.C. Sept. 29, 2006) (remanding the listing determination on other grounds).

[17] The Ninth Circuit implicitly agreed, finding that "it is not inconsistent with common usage, nor is it unreasonable, for the Service to construe … 'significant,' in the sense of being notable." *Northwest Ecosystem Alliance*, 2007 U.S. App. LEXIS 2296, at *20. Analyzing the meaning of "significant," as it is used in the Policy Regarding the Recognition of Distinct Vertebrate Population Segments Under the Endangered Species Act, the court later stated that "the term 'significant' has 'its commonly understood meaning, which is important.'" *Id.* at *30-31 (quoting *Nat'l Ass'n of Homebuilders v. Norton*, 340 F.3d 835, 846 (9th Cir. 2003) (citations and internal quotation marks omitted)).

which meaning of "significant" Congress intended. Even if it were clear which meaning was intended, "significant" would still require interpretation. For example, if it were meant to refer to size, what size would be "significant": 30%, 60%, or 90% of current range? Additionally, would, or should, the size be the same percentage in every case or for each species? Moreover, what factors, if any, would be appropriate to consider in making a size determination? Is size all by itself "significant," or does size only become "significant" when considered in combination with other factors? On the other hand, if "significant" were meant to refer to importance, what factors would need to be considered in deciding that a particular portion of a species's range is "important" enough to trigger the protections of the ESA?

Where there is ambiguity in a statute, as with the meaning of "significant," the official charged with administering the statute, which in this case is the Secretary, has broad discretion to resolve the ambiguity and give meaning to the term. As the Supreme Court has stated:

> In *Chevron*, this Court held that ambiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion. Filling these gaps, the Court explained, involves difficult policy choices that agencies are better equipped to make than courts. If a statute is ambiguous, and if the implementing agency's construction is reasonable, *Chevron* requires a federal court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation.

Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 980 (2005) (internal citations omitted).

In resolving the ambiguity, however, the Secretary does not have unlimited discretion. A court may overturn the Secretary's interpretation if it is "arbitrary, capricious, … or otherwise not in accordance with law." Administrative Procedure Act, 5 U.S.C. § 706(2)(A). In exercising his discretion, the Secretary must be guided, at a minimum, by the following considerations. First, in defining the term, he should do so in a way that is consistent with achieving the purposes of the statute. As a corollary, he may not define the term in a way that would make any other portion of the statute superfluous, and he should strive to define the term in a way that makes sense in the context of the statute as a whole. Second, he should take into account whatever legislative history might be relevant for purposes of determining the intent of Congress. Third, he should take into account any judicial interpretations of the term. Indeed, in those jurisdictions where the ambiguous term has been judicially interpreted, he may be bound by that interpretation, unless he has subsequently issued an authoritative interpretation of the term that differs from what the court found. *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. at 983–85. Each of these considerations is discussed below with reference to the meaning of the word "significant" in the SPR phrase.

a. Purpose of the Act

The primary stated purposes of the ESA include "to provide a means whereby the ecosystems upon which endangered and threatened species depend may be conserved" and "to provide a program for the conservation of such endangered and threatened species." ESA § 2(b). According to the Act's findings, such species of fish, wildlife, and plants are worthy of conservation because they are of "esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people." ESA § 2(a)(3). Thus, in defining what portion of a range will be considered "significant," it is appropriate for the Secretary to consider factors other than just the size of the portion in relation to the current range as a whole. He may define "significant" in such a way as to insure conservation of the species protected by the Act. For example, the Secretary could consider, among other things, the portion of the range in terms of the biological importance of that portion of the range to the species and in terms of the various values listed in the Act that would be impaired or lost if the species were to become extinct in either that portion of the current range or in the current range as a whole.

b. Legislative History

The legislative history addressing the meaning of the word "significant" is sparse. Some of the floor debate and hearing testimony strongly suggest the Secretary has the discretion to divide the range of a species along political boundaries and declare it endangered only in states where the state authorities are not providing adequate protection of the species. Given the language of the final bill, such a division would have to be consistent with his definition of what makes a portion of a species's range "significant." For example, in a floor debate on the Senate version of the ESA, Senator Tunney made the following remarks:

> [T]he Secretary may list an animal as "endangered" through all or a portion of its range. An animal might be "endangered" in most States but overpopulated in some. In a State in which a species is overpopulated, the Secretary would have the discretion to list that animal as merely threatened or to remove it from the endangered species listing entirely while still providing protection in areas where it was threatened with extinction. In that portion of its range where it was not threatened with extinction, the States would have full authority to use their management skills to insure the proper conservation of the species.
>
> A well-known example may serve to illustrate how S. 1983 provides for maximum management and conservation discretion, while insuring absolute protection for species imminently in danger of extinction. … It is likely that in certain portions of Louisiana, the American alligator may be relisted under this bill as a threatened species [in response to the State of Louisiana allowing the harvest of alligators in one parish to limit habitat destruction caused by overpopulation of alligators]. S. 1983 would permit continued State action to enhance the existence of this species. In other areas the alligator would remain

> listed as an endangered species and would be entitled to absolute Federal or State protection ….

119 CONG. REC. 25,669 (July 24, 1973). The attached appendix contains relevant portions of the legislative history from 1972 and 1973.[18]

c. Judicial Interpretations

Many of the courts that have addressed the meaning of the word "significant" have explicitly or by implication acknowledged that its ultimate meaning is ambiguous.[19] In that circumstance, even though a court may have adopted one interpretation or another for purposes of resolving the case before it, the Secretary is not necessarily bound by the court's interpretation, even in the area of that court's jurisdiction. As the Supreme Court has explained:

> A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.

Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. at 982. I have found no appellate cases that conclude that there is only one possible meaning of "significant."[20] Within certain limits, therefore, the Secretary has the authority to define a reasonable meaning of the word "significant" in the SPR phrase through a listing rule or by amending the rules that govern listing decisions.[21]

The Ninth Circuit, for example, while acknowledging that the Secretary has "a wide degree of discretion in delineating" what portion of a range is "significant," nonetheless appeared to set

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[18] *See The Endangered Species Conservation Act of 1972: Hearings on S. 3199 and S. 3818 Before the Subcomm. on the Environment of the Senate Comm. on Commerce*, 92nd Cong. 109 (1972) (statement of Curtis Bohlen, Deputy Assistant Secretary for Fish and Wildlife and Parks, Department of the Interior); *The Endangered Species Conservation Act of 1973: Hearings on S. 1592 and S. 1983 Before the Subcomm. on the Environment of the Senate Comm. on Commerce*, 93d Cong. 60-62 (1973) (statements of Dr. Earl Baysinger, Assistant Chief, Office of Endangered Species and International Activities, and Douglas Wheeler, Deputy Assistant Secretary for Fish and Wildlife and Parks); *see* Appendix at A-2–13.

[19] *See, e.g.*, *Defenders of Wildlife v. Norton*, 258 F.3d at 1142–43 (flat-tailed horned lizard) (finding the SPR phrase ambiguous and rejecting both a quantitative approach and the Secretary's approach based on the clarification interpretation of significance); *Ctr. for Biological Diversity v. Norton*, 411 F. Supp. 2d at 1277 (Rio Grande cutthroat trout) (finding the language of the SPR phrase "puzzling and enigmatic" and questioning whether "significant" may refer to size or biological significance). *But cf.*, *Defenders of Wildlife v. Norton*, 239 F. Supp. 2d at 19 (Canada lynx) (finding that "significant" means a "noticeably or measurably large amount" according to a dictionary definition).

[20] One district court has found that there is only one possible meaning of "significant." *Defenders of Wildlife v. Norton*, 239 F. Supp. 2d at 19 (Canada lynx).

[21] *See* Joint Regulations; Endangered Species Committee Regulations, 50 C.F.R. pt. 424. Note that these are joint regulations with the National Marine Fisheries Service, the National Oceanic and Atmospheric Administration, and the Department of Commerce. Consequently, any amendment of these regulations will require coordination with the National Marine Fisheries Service and approval by the Secretary of Commerce.

some outer limits of that discretion—i.e., the point at which an interpretation would be unreasonable or arbitrary. *See Defenders of Wildlife v. Norton*, 258 F.3d 1136, 1145 (9th Cir. 2001). On the one hand, it rejected what it called a quantitative approach to defining "significant," where a "bright line" or "predetermined" percentage of historical range loss is considered "significant" in all cases. *Id*. at 1143. According to the court, there are two problems with such an approach:

> First, it simply does not make sense to assume that the loss of a predetermined percentage of habitat or range would necessarily qualify a species for listing. A species with an exceptionally large historical range may continue to enjoy healthy population levels despite the loss of a substantial amount of suitable habitat. Similarly, a species with an exceptionally small historical range may quickly become endangered after the loss of even a very small percentage of habitat.

Id. The Ninth Circuit concluded, at least with respect to range loss, that what is "significant" must "necessarily be determined on a case by case basis," and must take into account not just the size of the range but also the biological importance of the range to the species. *Id*. At the other end of the spectrum, the Ninth Circuit rejected what it called "the faulty definition offered by the Secretary," a definition "flatly inconsistent with the statute" that holds that a portion of a species's range is "significant" only if the threats present there are severe enough to put the species in jeopardy of worldwide extinction. *Id*. at 1143, 1146. The Ninth Circuit found, in effect, that because such an interpretation would make surplusage out of other words in the definition of endangered species, the interpretation would be unreasonable. It thus appears that within the two outer boundaries set by the Ninth Circuit, the Secretary still has wide discretion, even in the Ninth Circuit, to give the definitive interpretation of the word "significant" in the SPR phrase.

B. Reading the SPR Phrase in Harmony with other ESA Provisions

In interpreting the SPR phrase, the Secretary must do so "with a view to [its] place in the overall statutory scheme." *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989). I address here questions that have been raised about whether reading the SPR phrase as a substantive standard can be done in harmony with sections 3(16), 4(a)(1), and 4(c)(1) and sections 7 and 9.

1. Determining Whether a Species is an Endangered Species and Specifying Over What Portion of it its Range it is Endangered

Section 4 establishes the process the Secretary is to use to determine whether any species is an endangered species because of any of five statutory factors. Section 4(b) establishes the informational basis and the procedure the Secretary is to use to make his determinations. Section 4(c) requires the Secretary to publish a list of all species determined to be endangered species, referring to the species by name, specifying over what portion of its range it is endangered (and hence, an endangered species), and specifying any critical habitat within such range.

The Department has previously argued that reading the SPR phrase as a substantive standard for determining whether a species is an endangered species would lead to a violation of the listing provisions in section 4 of the Act, and that therefore such a reading of the SPR phrase must be in error. According to the argument, such a reading would be inconsistent with the listing provisions in two ways. First, it would improperly allow the Secretary under section 4(a)(1) to determine that something less than a species as a whole is endangered, and, second, it would improperly allow the Secretary under section 4(c)(1) to list as endangered something less than a species as a whole. For example, a recent brief filed on behalf of the Department argued that "[l]isting a species in only the significant portion [of its range] where it is found to be endangered … would allow FWS to list a lesser entity than those specified in the 'species' definition, which would appear to violate section 4(a)(1)." Defendant's Supplemental Brief in Response to Court's June 8, 2005 Memorandum Opinion and Order at 10, *Ctr. for Biological Diversity v. Norton*, 411 F. Supp. 2d 1271 (D.N.M. 2005) (No. CIV 03-252 LFG/LAM).

The problem with the argument, both with respect to section 4(a)(1) and section 4(c)(1), is that it is a classic case of allowing the tail to wag the dog. Moreover, as discussed in the following section, the argument is inconsistent with the legislative history of the ESA.

With respect to section 4(a)(1), the argument simply assumes a meaning for that section and then uses that meaning to interpret the definition of "endangered species," instead of settling on a meaning for the definition of "endangered species" and then using that definition when applying section 4(a)(1). The argument assumes that because section 4(a)(1) requires (authorizes) the Secretary to determine whether "any species is an endangered species," only a species as a whole can be endangered. In other words, it is all or nothing; a species is either endangered in its entirety or it is not endangered. This reading of section 4(a)(1), however, simply begs the question of what it means to be an "endangered species." Because "endangered species" is a defined term in the Act, one must start with that definition to determine the meaning of section 4(a)(1), rather than vice versa. When the construction of the Act is approached in that manner, section 4(a)(1) can be read in full harmony with a reading of the SPR phrase as a substantive standard.

Section 4(a)(1) requires the Secretary to "determine whether any species is an endangered species." There are two defined terms in that phrase—"species" and "endangered species." Section 3(16) defines "species" as including "any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature." In other words, under the definition, three different groups of organisms expressly qualify as a "species":

1. a group of organisms comprising all of the organisms in a species;
2. a group of organisms comprising all of the organisms in "any subspecies of fish or wildlife or plants"; or
3. a group of organisms comprising "any distinct population segment of vertebrate fish or wildlife which interbreeds when mature."

Section 3(6) defines "endangered species" as any species which is in danger of extinction either throughout all of its range or throughout a significant portion of its range. Thus, under section 4(a)(1), the Secretary must examine whether:

1. the members of any group of organisms constituting a "species" are in danger of extinction throughout all of the species's range; or
2. the members of any group of organisms constituting a "species" that inhabit a significant portion of the species's range are in danger of extinction.

The Secretary is required to make his determinations in section 4(a)(1)

> solely on the basis of the best scientific and commercial data available to him *after* conducting a review of the status of the species *and after* taking into account those efforts, if any, being made by any State or foreign nation, or any political subdivision of a State or foreign nation, to protect such species, whether by predator control, protection of habitat and food supply, or other conservation practices, within any area under its jurisdiction, or on the high seas.

ESA § 4(b)(1)(A) (emphases added).

The Secretary is thus asked to determine under section 4(a)(1) which members of the species are endangered, either all of the members or only those members that inhabit a significant portion of the species's range. For example, the Secretary might examine the American alligator as a species, determine that Florida is a significant portion of the American alligator's range, and conclude that American alligators in Florida are in danger of extinction, even though alligators elsewhere are not.

Having made his determination, the Secretary would then be required to comply with the listing requirements in section 4(c)(1). That section requires him to "publish in the Federal Register a list of all species determined by him … to be endangered species." Some have argued that this language means that only a species as a whole can be listed. However, the balance of the language in the section proves otherwise. The section requires, in full, that the list "refer to the species … by scientific and common name or names, specify with respect to each such species over what portion of its range it is endangered …, and specify any critical habitat within such range."[22]

[22] It has also been questioned whether interpreting the SPR phrase as a "substantive standard" for listing is consistent with the "distinct population segment of any species of vertebrate fish or wildlife." ESA § 3(16). The argument is that Congress intended that the protections of the Act below the taxonomic category of subspecies be limited to DPSs, thus the protection of a subset of a DPS (in this case a SPR of a DPS) would be inconsistent with this intent. There is, however, no support in the language of the Act or its legislative history for the assertion that Congress included the DPS language to alter or limit the meaning of the SPR phrase. The DPS language was added to the definition of "species" five years after the SPR phrase and replaced earlier language that Congress evidently concluded was too broad. *See* H.R. CONF. REP. NO. 95-1804, at 17 (1978). Moreover, Congress refused twice in 1978 to specifically alter the language of the SPR phrase. *See* Appendix at A-16–17. Instead, the DPS language and the SPR phrase give the Secretary two different tools "to provide a program for the conservation of … endangered species"—the overarching goal of the Act. ESA § 2(b). In some cases, the results achieved with those tools will

Applying the requirements of section 4(c)(1) to my example of the American alligator, the Secretary would refer to it by its scientific or common name, specify that portion of its range in which it is endangered as Florida, and specify any critical habitat within its range. In so doing, he would not be listing a "lesser entity than those specified in the 'species' definition"; rather, he would be doing exactly what section 4(c)(1) requires—identifying the members of the species that are "endangered species" by specifying the portion of the range in which they are in danger of extinction. As a result of such a listing, the public might commonly refer to the American alligator as "endangered," or as having been "listed"; however, for purposes of the Act, it would only be the alligators in Florida that would be "endangered." The Ninth Circuit appeared to adopt this approach in the flat-tailed horned lizard case, implying that different portions of a species's range may require enhanced or different degrees of protection. *Defenders of Wildlife*, 258 F.3d at 1146.[23] Accordingly, section 4 can be read in harmony with a reading of the SPR phrase as a substantive standard.

2. Protecting Listed Species

Similarly, the protections afforded in sections 7 and 9 to endangered species can also be applied in full harmony with a reading of the SPR phrase as a substantive standard.

Section 7 requires federal agencies to insure, in consultation with the Secretary, that their actions are "not likely to jeopardize the continued existence of any endangered species." It bears highlighting that section 7(a)(2) requirements apply to "endangered species," not species as a whole. In other words, the section does require consultation on any species that is listed as threatened or endangered. Under our reading of the SPR phrase, an "endangered species" can consist either of all of the members of a species, regardless of where they live, or of all the members of a species that inhabit a significant portion of a species's range. Thus, when a species is listed pursuant to section 4(c)(1) as endangered throughout all of its range, federal agencies are required to consult about their actions that may affect the species regardless of where they might occur throughout the entire range of the species. By the same token, where a species is listed pursuant to section 4(c)(1) as endangered in only a portion of its range, federal agencies are required to consult about their actions only if they may affect the members of the species inhabiting that portion of its range. In short, if a proposed federal agency action may affect a species within a significant portion of its range where it is classified as an endangered species or a threatened species, the agency must consult with the Service on that action.

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overlap—e.g., a DPS might, by definition, inhabit a significant portion of a species's range, depending on how the Secretary defines "significant." But this potential for overlap does not mean that the DPS language alters or limits the meaning of the SPR phrase.

[23] The court also extensively quoted the legislative history supporting the view that the protections of the Act are limited to the portion of the species's range in which it is endangered. *Defenders of Wildlife*, 258 F.3d at 1144–45; *see also Roosevelt Campobello Intl. Park Comm'n v. U.S. Envtl Protection Agency*, 684 F.2d 1041, 1050 n.5 (1st Cir. 1982) (bald eagle) ("[T]he Secretary of the Interior is given the exclusive duty and power to publish a list specifying 'with respect to each ... species over what portion of its range it is endangered.' … We see no reason why the Secretary should not have … authority to ascertain the appropriate range in which the species is endangered …. In any case, the legislative history appears to authorize the Secretary to deem a species endangered in the United States, or a portion thereof, even if it is abundant elsewhere").

Section 9 prohibits any person from taking certain actions "with respect to any endangered species of fish or wildlife." Once again, it bears repeating that Congress used the term "endangered species," and not "species" as a whole. For example, it is unlawful to "take" any member of an endangered species of fish or wildlife within the United States. As noted above, under our reading of the SPR phrase, an "endangered species" can consist either of all of the members of a species, regardless of where they live, or of all the members of a species that inhabit a significant portion of a species's range. Thus, where a species is listed pursuant to section 4(c)(1) as endangered throughout all of its range, it would be unlawful to "take" any member of that species subject to the jurisdictional limitations of section 9. By the same token, where a species is listed pursuant to section 4(c)(1) as endangered in only a portion of its range, it would only be unlawful to "take" a member of the species that inhabits that portion of its range. In the first instance, the Secretary would have specified that the species is endangered in all of its range, while in the second instance the Secretary would have specified the portion of its range where it is endangered. In summary, it would be a violation of section 9(a)(1)(B) of the ESA if a person, while in the United States, "takes" an individual of a fish and wildlife species from a significant portion of its range that has been classified as an endangered species. It is the act of taking a member of an endangered species that establishes the violation—not the taking of a member of the species itself.

Reading the Act to require protection for a species only where it is endangered, as specified in section 4(c)(1), provides precisely the flexibility that the Nixon Administration sought in 1972 and the Congress provided in 1973. In 1972, when responding to a written question from then Senator Spong, who had expressed his understanding that "a species could be declared endangered over part of its range and not declared endangered in other parts," a Deputy Assistant Secretary responded for the Department in the affirmative. He stated, "[i]t is our hope that this ability to provide selective protections would provide protections to those animals needing it, encourage the agencies which have management and protective authority to exercise that authority and allow the recognition of such efforts." Appendix at A-6. Embracing such an approach, the Senate Commerce Committee noted, "[b]y providing for the listing of a species endangered throughout a significant portion of its range, the Committee recognized the need for maintaining a viable population of species or subspecies where possible in more than just one portion of the world." Appendix at A-8. These concepts derived from the legislative history of the Act are subsumed within the provisions of section 4(b)(1), which specifically requires the Secretary to consider the presence of conservation practices and management measures that are in place in various nations or States when making determinations under section 4. By "taking into account … those efforts being made by any State … or any political subdivision of a State … to protect … species, whether by predator control, protection of habitat and food supply or other conservation practices," when making his determination of endangerment and then "specify[ing] over what portion of its range" a species is endangered, the Secretary is able to recognize the conservation practices and protection efforts of States and local jurisdictions, while also ensuring the Act's protections are properly provided.

In 1973, during committee hearings, then Representative John Breaux stated he understood the legislation to allow the Secretary "to designate areas in which the species is endangered and

areas where it is not endangered." Appendix at A-10. Then Assistant Secretary Reed testified that "[t]he administration's bill gives the Secretary the power to allow harvest in areas where the animal is not presently threatened with extinction and protect [it] in areas where [it] is in trouble, that is where [it] is likely to become threatened with extinction." Appendix at A-9. Similarly, the floor debates for the Endangered Species Act of 1973 in both the House of Representatives and the Senate support the ability of the Secretary to provide protections of the Act to a species where it is in danger of extinction, and not doing so for those areas where it is not in danger. Appendix at A-12–13.

An alternative reading—that a species must be protected throughout its entire range even if it is found to be endangered in only a significant portion—would render section 4(c)(1) meaningless, or at least relegate its application to delineating the range of distinct population segments and experimental populations, although neither of these terms existed when Congress prescribed the requirements for listing in section 4(c)(1).[24] Moreover, this reading would conflict with the Congressional desire that "the Federal government should protect [endangered or threatened] species where States have failed to meet minimum Federal standards, it should not pre-empt efficient programs." S. REP. NO. 93-307, at 3 (1973). Finally, the alternative reading would frustrate the import of requiring that the conservation practices within a State, or its political subdivisions, be taken into account when making a determination under section 4(a)(1). A statutory term should not be construed to lead to absurd results. *Nixon v. Mo. Mun. League*, 541 U.S. 125, 138 (2004).

The protections afforded in sections 7 and 9 to endangered species can also be applied in full harmony with a reading of the SPR phrase as a substantive standard.

III. CONCLUSION

I trust this memorandum and its conclusions will be helpful to you in developing your SPR policy. The Service, acting for the Secretary, has considerable discretion to consider a number of factors when determining whether a species is endangered in any significant portion of its range. Therefore, my office stands ready to assist you as you seek to explain how that discretion should

[24] In 1982, several operative provisions contained in section 4(c) were moved to section 4(b). However, the legislative history does not indicate that Congress intended the amendments to diminish the operative effect of the remaining provisions in section 4(c). In fact, plaintiffs have successfully enforced another provision of section 4(c), the requirement that the Secretary conduct reviews of listed species at least every five years. *See, e.g., California State Grange v. Norton*, No. CIV-S-05-00560 MCE/PAN, slip op. (E.D. Cal. Sept. 20, 2005) (approving settlement agreement in case in which plaintiffs alleged failure to conduct reviews under section 4(c)(2) of 194 listed species; in settlement, dated Sept. 12, 2005, the United States agreed to deadlines for completing reviews of all 194 species). Moreover, this reading is consistent with the definitions of "conserve," "conserving," and "conservation" relating to bringing "any endangered species or threatened species to the point where the measures provided pursuant to this Act are no longer necessary." ESA § 3(3). It is doubtful that Congress would have required the Secretary to specify which portion of a species range is endangered or threatened, if in all instances the entire range was to be specified. Given the context of the Congressional discussion leading to the passage of the ESA in 1973, it is doubtful that Congress would require the measures of protection provided in the Act to apply in those portions of the range where the species is neither endangered or threatened. *See* Appendix at A-4–6 & A-8–13.